Bulletin

Workplace Relations

Reference No. Changes to Fair Work Act/dh-11-22 **Date:** 03/11/2022

Albanese Government seeks to rush through major changes to Fair Work Act

On 27 October 2022, the *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill) was introduced into the Federal Parliament. The Bill reflects a mix of both election promises and announcements made following the recent Jobs & Skills Summit (see previous **Bulletin**) and would result in major changes to the Fair Work Act 2009. The changes proposed are very significant and represent one of the most fundamental overhauls of employment laws in decades.

Disappointingly, the Bill proposes no substantive changes to the Better Off Overall Test (BOOT) and therefore does nothing to facilitate the type of productivity improvements that would enable businesses to generate sustainable wage increases. Rather, the Bill suggests that the Albanese Government is dangerously beholden to the trade union movement and is seemingly prepared to ignore the interests of both employers and the 90% of private sector workers who choose not to be a member of a union. Further, in doing so, it seeks to move away from the current industry practice of incentivising and rewarding employees at an individual level, replacing it with a 'one size fits all' collectivist approach.

The Albanese Government has flagged its intention to pass the new laws before the end of 2022 and has truncated the conventional processes allowing Parliamentary scrutiny. This means the Parliament could be forced to vote on the Bill within a matter of weeks. **All automotive employers are likely to be impacted if the proposed changes become law.**

What are the most relevant areas of change for the automotive industry?

While the Bill contains a wide range of proposed changes, the areas most relevant for the automotive industry include changes that will:

- Completely overhaul **enterprise bargaining;**
- Expand existing rights for workers to **request flexible working conditions**;
- Make it illegal for contracts or employment instruments to contain **pay secrecy** clauses, or to have **fixed term contracts** that last for more than two years; and
- Create additional, tougher rules for employers (and rights for unions) on **anti-discrimination and workplace sexual harassment.**

Enterprise Bargaining

The Bill makes big changes to the existing enterprise bargaining system and abandons the decades old bi-partisan approach of encouraging enterprise agreement negotiations in each individual workplace that are specific to one employer and its employees. Instead, the Bill proposes to allow unions to negotiate far more widely and seek to have one agreement apply to multiple businesses, even if those businesses are competitors in the same industry. The Bill provides three multi-employer bargaining streams: 'single interest', 'supported', and 'cooperative'. A summary of the key elements of each stream are provided below:

"Single Interest" Bargaining Stream:

- Removes a range of current checks and balances, including that it be voluntary and limited to businesses operating 'cooperatively rather than competitively'.
- Expands coverage to any business that meets the new (and potentially meaningless) "**common interest test**", which may be determined broadly based on "geographic location", "regulatory regime" and "terms and conditions of employment" factors. For example, this could mean that businesses in Melbourne who are covered by, and pay in accordance with, the same modern award (e.g. Vehicle Repair, Services and Retail Award) could be deemed to have a 'common interest'.
- Allows **unions** to make application to the Fair Work Commission (FWC) for a "**single interest authorisation**" to cover multiple employers.
- Entitles FWC to **approve** the authorisation if a "majority" of employees wish to be covered by the authorization without the agreement of the employer. However, this is an overall majority of employees across all of the businesses and does not require a majority in each individual business.
- Enables **unions and employees** to take **protected industrial action** (e.g. lawful strike action) if a majority of employees vote to approve the industrial action. Again, this is an overall majority of employees across all of the businesses and does not require a majority in each individual business.
- Enables **unions** to apply to the FWC for an "**intractable bargaining declaration**" in certain circumstances, which if granted, ultimately empowers the FWC to **arbitrate** to make a final decision determining outstanding terms and conditions in the agreement.
- Allows the **union** to make application to **'rope in' other employers without their consent**. The FWC will be able to vary the single-interest agreement to include such employers if it is satisfied that there is a common interest, it is not contrary to the public interest and that a majority of employees at the employer's business wish to be covered.

Note: A small business exemption (15 employees or less, including related bodies corporate) applies to single-interest agreements. However, a small business may consent to be covered.

"Supported" Bargaining Stream:

- Replaces existing "low paid" multi-enterprise bargaining stream, but **no longer requires that covered employees be low paid**. Rather, it is "intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level".
- Allows **unions** to make application to FWC for a "**supported bargaining authorisation**" to cover multiple employers.
- In addition to the "common interest test" (outlined above), FWC would also need to consider the **prevailing pay and conditions** of the relevant industry, including whether employees are paid at or close to relevant award rates, to approve the authorisation. There is **no requirement** for a majority of employees to approve the supported bargaining authorisation.
- Enables **unions and employees** to take **protected industrial action** (e.g. lawful strike action) if a majority of employees vote to approve the industrial action. As in the case of single-interest bargaining, this is an overall majority of employees across all of the businesses and does not require a majority in each individual business.
- Enables **unions** to apply to the FWC for an **intractable bargaining declaration** in certain circumstances, which if granted, ultimately empowers the FWC to **arbitrate** to determine outstanding terms and conditions in the agreement.
- Allows the **union** to make application to **'rope in' other employers without their consent**. FWC will be able to vary the supported bargaining agreement to include such

employers if it is satisfied that it is appropriate to do so and that a majority of employees at the employer's business wish to be covered.

Note: A small business exemption does <u>not</u> apply to supported bargaining agreements.

<u>"Co-operative" Bargaining Stream:</u>

- A new bargaining stream intended to target small business, but in theory open to all.
- It will be **voluntary for employers**, meaning there is no access to protected industrial action; intractable bargaining declarations; or 'roping in' without the employer's consent.
- FWC will play a more **proactive** role in the bargaining process.
- Whilst unclear exactly how the new stream will operate in practice, it **mandates union involvement**. That is, a co-operative workplace agreement **cannot be negotiated directly between employers and employees** as it requires a union to be a bargaining representative for at least some of the employees to be covered.

Requests for Flexible Working Conditions

The Bill changes the existing rules, which require employers to genuinely consider requests from employees for flexible working conditions under the National Employment Standards (NES). At present, if an employer cannot agree it needs to be for reasonable business grounds and the employee must be given reasons in writing explaining the refusal.

The Bill will add more rules that require employers to give far more detailed reasons for the refusal, propose alternative work arrangements (if any) and give employees the right to take disputes to the FWC. The FWC will then have the **power to arbitrate and overturn the employer's refusal**. Arbitration is not by consent and can occur at the request of the employee only.

Pay Secrecy Conditions and Limitations on Fixed Term Contracts

The Bill will **prohibit pay secrecy terms** in contracts of employment and industrial instruments that prevent employees from disclosing their remuneration. A new workplace right will be added to the "General Protections" for employees to choose to either disclose or not disclose their remuneration. There will also be prohibitions on coercing employees to exercise or not exercise this right. The Bill will also **prohibit fixed term contracts of employment of more than 2 years**, as well as consecutive contracts with a combined duration of more than 2 years, **subject to various exemptions** (including for example, where the employee is engaged under a training contract, is earning above the "high income threshold" or for a "distinct and identifiable task involving specialised skills"). Employers must provide all employees who are employed on a fixed term contract (regardless of if they are subject to an exemption) with a new "Fixed Term Contract Information Statement" upon commencement of their employment, even if they are covered by one of the exemptions.

Workplace Sexual Harassment and Anti-Discrimination

The Bill will change existing rules so that employers will now be held liable for sexual harassment in their workplace in a similar way they are responsible for safety under Work Health and Safety laws, i.e. they can be liable for conduct by sub-contractors contractors or non-employee workers. Importantly, **businesses will also be vicariously liable** for conduct by their employees or agents unless they can prove they "took **all reasonable steps** to prevent the relevant acts." In practice, the 'all reasonable steps' test has often proved insurmountably, and unreasonably high, for small business in particular.

In addition to the "aggrieved person" (i.e. the worker alleging harassment), a **union will be entitled to make application** to the FWC in its own right to deal with a sexual harassment dispute if it has industrial coverage over the work performed by the aggrieved person. In addition to powers to issue "stop sexual harassment orders", the FWC will now also:

- **arbitrate** disputes if it considers that "all reasonable attempts to resolve the dispute are likely to be unsuccessful" where at least one notifying party (e.g. aggrieved person) and the employer consent; and
- order **financial compensation**

The Bill also provides that a notifying party (e.g. a union) that did not consent to the arbitration reserves the right to make a sexual harassment court application against an employer that was subject to the consent arbitration – i.e. have their cake and eat it too. The Bill also proposes to expand the range of "protected attributes" in the anti-discrimination provisions of the Act (set out in the "General Protections"). They will now include three new attributes: breastfeeding, gender identify and intersex status.

Small Claims and Advertising Jobs Below the Legal Rate

The Bill will prohibit employers from advertising jobs with wage rates that are less than the applicable rate under the relevant modern award or enterprise agreement (or the Federal Minimum Wage for award-free employees). Employers will not contravene this provision if they have a "reasonable excuse". The Bill also increases the thresholds relevant for wage and condition underpayments. Courts will now be able to hear "small claims" defined as an amount up to $100,000 rather than the existing $20,000.

TACC will continue to keep members informed as it works with ACCI and other stakeholders to ensure that the interests of the automotive industry are represented during the legislative reform process. In the interim, members seeking further information or assistance are encouraged to contact the Workplace Relations team at ir@vacc.com.au or 03 9829 1123.

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